UNITED STATES SUPREME COURT

OCTOBER TERM, 1980

No. 80-5520

ROBERT LEE MASSIE, Petitioner,

vs.

GEORGE SUMNER, Warden,
San Quentin Prison, Respondent.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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OPINIONS BELOW

Petitioner seeks a writ of certiorari to review the opinion of the United States Court of Appeals for the Ninth Circuit reported at 624 F.2d 72 which affirmed the order of the United States District Court for the Northern District of California denying his petition for a writ of habeas corpus. The District Court's order was not reported. Copies of the Circuit Court's opinion and the District Court's order were attached to the Petition for Writ of Certiorari as Appendix A and C respectively.

JURISDICTION

Petitioner invokes the jurisdiction of this Court pursuant to Title 28 U.S.C. section 1254(1).

QUESTION PRESENTED

Did the District Court properly abstain from interfering with the appeal pending before the California Supreme Court from petitioner's death sentence?

STATEMENT OF THE CASE

By petition for writ of habeas corpus filed July 9, 1979, and amended on August 7th, petitioner sought to enjoin the California Supreme Court from proceeding with an appeal from the judgment of the Superior Court of the State of California for the County of San Francisco imposing the sentence of death upon him. On October 3rd the district court entered its order of dismissal and issued a certificate of probable cause for an appeal. On June 30, 1980 the Circuit Court affirmed the order of the District Court. The instant petition for a writ of certiorari was docketed on October 8, 1980.

ARGUMENT

I

On May 8, 1979, petitioner entered a plea of guilty to murder in the first degree, a violation of California Penal Code section 187. "People of the State of California v. Robert L. Massie, No. 98306" in the files of the Superior Court of the State of California for the City and County of San Francisco. Petitioner admitted he had previously been convicted of murder in the first degree,[1/] and that the murder to which he was pleading guilty was committed while he was engaged in the commission of a robbery in violation of California Penal Code section 211. The admission of these two "special circumstances" limited the possible penalties to death, or confinement for life without the possibility of parole. See California Penal Code sections 190.2(a)(2)(17)(i).

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1. Contrary to petitioner's assertion (Petition, p. 9) counsel was appointed to represent him on his automatic appeal from this conviction. See People v. Massie (1967) 66 Cal.2d 899, 903; 59 Cal.Rptr. 733, 736.

The judgment of death was pronounced on May 25, 1979. Pursuant to California Penal Code section 1239(b), an appeal from this judgment was automatically taken and is now pending before the Supreme Court of the State of California. That Court appointed the California State Public Defender to represent petitioner and has denied petitioner's motion to abandon and dismiss that appeal.

In the federal district court petitioner contended that his incarceration, pending determination of the state appeal which he does not wish to pursue, amounts to the infliction of cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution. It is respondent's position that the petition did not allege facts sufficient to warrant the district court's interference in a pending state criminal prosecution; indeed, it did not allege the denial of a federally protected right.

A. The district court properly abstained .

California requires that the safeguards enacted by our legislature to protect those upon whom the death penalty has been imposed must be utilized. People v. Stanworth (1969) 71 Cal.2d 829, 831, 80 Cal.Rptr. 49, 59. The courts of our state have held that where the most severe of all penalties has been imposed, the automatic appeal affords a substantial benefit, not only to the appellant, but to society as well. See People v. Powell (1974) 40 Cal.App.3d 107, 143; 115 Cal. Rptr. 109, 132. Thus, the People of the State of California have an interest, independent of petitioner Massie, in the accuracy of the special circumstances and penalty determinations made by the trial court. See People v. Teron (1979) 23 Cal.3d 103, 115, fn. 7; 151 Cal.Rptr. 633, 639.

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"[W]e are not dealing with a right or privilege conferred by law upon the litigant for his sole personal benefit. We are concerned with a principle of fundamental public policy. The law cannot suffer the state's interest and concern in the observance and enforcement of this policy to be thwarted through the guise of waiver of a personal right by an individual. 'Anyone may waive the advantage of a law intended for his benefit. But a law established for a public reason cannot be contravened by a private agreement.' (California Civil Code section 3513)." People v. Blakeman (1959) 170 Cal.App.2d 596, 598; 339 P.2d 202, 203 cited with approval People v. Stanworth, supra, 71 Cal.2d at 834; 80 Cal.Rptr. at 59.

Petitioner sought to have the district court enjoin the California Supreme Court from determining his automatic appeal. The district court could not grant such an injunction "except as especially authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." Title 28 U.S.C. section 2283. Only under the most extraordinary of circumstances, where the danger of irreparable loss is both great and immediate, may a federal court interfere in a state criminal prosecution. Younger v. Harris (1971) 401 U.S. 37, 46. The State of California has a legitimate interest, independent of petitioner's in seeing that the automatic appeal from the imposition of the judgment of death is prosecuted to a final determination.

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Petitioner contends his incarceration on death row amounts to cruel and unusual punishment as well as involuntary servitude. When petitioner plead guilty to first degree murder he exposed himself to a minimum sentence of twenty-five years. California Penal Code section 190. Upon admitting the alleged special circumstances his minimum sentence became life without possibility of parole. California Penal Code section 190.2(a). Thus, petitioner's allegation that he will be compelled to undergo incarceration during the period necessary to determine his automatic appeal did not allege either great or immediate danger of any irreparable injury.[2/] The mere fact petitioner is incarcerated in a maximum security section of the prison does not allege a deprivation of a constitutional right. United States ex rel. Verde v. Case (1971 ED Pa) 326 F.Supp. 701; see also, Meachum v. Fanno (1976) 427 U.S. 215. Petitioner has not alleged he is being confined under conditions which are shocking to the conscience. Nor, contrary to his assertion (Petition, p. 11) is he tormented by having his execution date set and reset. No execution date can be set until his automatic appeal has been determined. See California Penal Code sections 1239(b) and 1227.

Since petitioner did not allege any "special circumstances" which would allow the district court to exercise its habeas corpus, injunctive or declaratory judgment powers

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2. Petitioner cites his prior lengthy confinement on death row awaiting execution to support his claim of cruel and unusual punishment. Since then, legislation has been enacted requiring that appeals in capital cases be decided expeditiously. See California Penal Code section 190.6. Pursuant to that provision, petitioner's appeal should have been decided within 150 days after the record was certified by the trial court to the California Supreme Court on April 23, 1980. The appeal has been fully briefed and awaits oral argument. A failure to meet the time limit of section 190.6 is not grounds for precluding the ultimate imposition of the death penalty; the Chief Justice is, however, required to explain the delay.

to halt an ongoing state criminal proceeding [Compare Dolack v. Allenbrang 548 F.2d 891, 893 (10th circuit 1977)] that court properly permitted the California courts to conclude their prosecution of petitioner free from interference. Younger v. Harris, supra, 401 U.S. at 43; Hicks v. Miranda (1975) 422 U.S. 332, 349.

B. Petitioner has failed to allege the denial of a federally protected right.

The predicate for granting relief in federal habeas corpus or review by certiorari is a determination that the petitioner's custody violates the Constitution, laws, or treaties of the United States. Title 28 U.S.C. section 2241; Townsend v. Sain (1963) 372 U.S. 293, 312. "Federal courts must withhold interference with the administration of state criminal justice unless a federal right has been violated." Jackson v. California 336 F.2d 521, 524-525 (9th circuit 1951), cert. denied, 342 U.S. 929 (1952). See also MacDonald v. Muzic 425 F.2d 373, 376 (9th circuit 1970). California courts

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have control over their procedures, subject only to the qualification that those procedures do not work a denial of fundamental rights, or conflict with specific and applicable provisions of the Federal Constitution. California has determined that the People's interest in the accuracy and validity of the findings and judgment imposing the death penalty are independent of the petitioner and cannot be waived by him. This interpretation of California Penal Code section 1239(b) is solely a question of state law and "It is not the province of a federal habeas court to reexamine these questions." Rose v. Hodjes (1975) 423 U.S. 19, 22. See also Graves v. Eyman 373 F.2d 324, 325 (9th circuit 1967). This Court has also recognized automatic appellate review in death penalty cases as a hallmark of a constitutional capital punishment statute. Gregg v. Georgia 428 U.S. 153, 198 (1976). Thus, we distinguish Hammett v. Texas ___ U.S. ___, 100 S.Ct. 2905 (1980) relied upon by petitioner. Although direct appellate review in death penalty cases is automatic in California, there is no right to review in this Court. Supreme Court Rule 60 allows for the voluntary withdrawal of Petitions for Certiorari. As noted above, the comparable California Court Rule (Rule 19), which allows voluntary abandonment of appeals, has been judicially qualified to prevent such dismissals in capital cases. Moreover, unlike Texas, California does oppose petitioner's attempt to circumvent appellate review of his conviction and sentence. Unlike the situation in Hammett, where dismissal would not foreclose an appropriate application for collateral relief, failure to exhaust state appellate remedies would prevent petitioner from collaterally attacking his conviction and sentence in the federal courts. See Title 28, U.S.C. section 2254(b).

Petitioner contends that the California Supreme Court's appointment of the California State Public Defender to represent him on his automatic appeal violates rights secured to him by the Sixth Amendment to the Federal Constitution. For this proposition he relies upon Faretta v. California (1975) 422 U.S. 806. Under California law a criminal defendant has neither a constitutional nor statutory right to argue his case on appeal, or to be present during such proceedings. California Penal Code section 1255; People v. Ashley (1963) 59 Cal.2d 339, 361, 29 Cal.Rptr. 16, 29, cert. denied, 374 U.S. 819, People v. Coyle (1948) 88 Cal.App.2d 967, 970, 200 P.2d 546, 549; cf. Title 28 U.S.C. section 1654. Indeed, under certain circumstances, counsel may be appointed on appeal over the defendant's objections. People v. Ashley, supra, 59 Cal.2d at 358, 29 Cal.Rptr. at 27; see also Penal Code sections 1239-1241.

> "Once appointed, the attorney has the exclusive right to appear and control court proceedings as long as fundamental rights are not denied; neither the party himself nor another attorney can be recognized in the conduct or disposition of the case. (People v. Mattson (1959) 51 Cal.2d 777, 336 P.2d 937; People v. Merkouris (1956) 46 Cal.2d 540, 554; 297 P.2d 999)." In re Walker (1976) 56 Cal.App.3d 225, 228, 128 Cal.Rptr. 227, 292-293.

Faretta v. California, supra, does not compel a change in this settled California law.

Faretta holds that the Sixth and Fourteenth Amendments guarantee that a defendant in a state criminal trial has an independent constitutional right of self representation and that

he may proceed to defend himself without counsel when he voluntarily and intelligently elects to do so. The court did not have before it any claim of a right to self representation on appeal; indeed, the majority opinion cited with approval Price v. Johnson (1948) 334 U.S. 266 which held that a convicted person has no absolute right to argue his own appeal. Faretta v. California, supra, 422 U.S. at p. 816; see also In re Walker, supra, 56 Cal.App.3d at 228-229, 128 Cal.Rptr. at 293.

In Price v. Johnson, supra, this Court held that although an appellate court has the power to command that a prisoner be produced to argue his own appeal, the exercise of that power is a matter of sound judicial discretion.

> "The discretionary nature of the power in question grows out of the fact that a prisoner has no absolute right to argue his own appeal or even to be present at the proceedings in an appellate court. [Citation omitted] The absence of that right is in sharp contrast to his constitutional prerogative of being present in person at each significant stage of a felony prosecution, . . . and to his recognized privilege conducting his own defense at the trial. Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system." Price v. Johnson, supra, 334 U.S. at 285, 68 S.Ct. 1049, 1060.

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Petitioner's allegation that his automatic appeal may result in a violation of his right not to be twice placed in jeopardy is premature. It rests upon the supposition his conviction will be reversed and he will be required to stand trial. Should these events transpire, petitioner may enter a plea of "once in jeopardy" in the trial court. If petitioner's premise[3/] has merit, it is unlikely it would not be resolved in the California courts, since the scope of the prohibition against double jeopardy is broader under California law. See Bunnell v. Superior Court (1975) 13 Cal.3d 592, 601; 119 Cal.Rptr. 302. We do not, of course, concede the validity of petitioner's premise. This Court has recognized automatic appellate review as a hallmark of a constitutional death penalty statute. Gregg v. Georgia 428 U.S. 153, 198 (1976). If petitioner's argument is valid and an error occurred in the initial proceedings, he is entitled to escape any punishment for the murder he admits he committed. Such a result would:

> ". . . hark back to the formalistic artificialities of seventeenth century criminal procedure . . ." Gori v. United States 367 U.S. 364, 369 (1961).

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3. Petitioner argues from the premise -- since I eschew the appeal, I cannot be said to have waived the protection of the double jeopardy clause.

CONCLUSION

Since all of deprivations of constitutional rights claimed by petitioner spring from his erroneous claim he has a right to self representation on his automatic appeal, his petition for a writ of certiorari should be denied.

DATED: November 25, 1980

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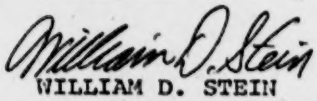

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